Supreme Court, U.S.
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No. 95-456

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

FRED W. RISTOW and SUSAN M. RISTOW,
Petitioners,

V.

THE SOUTH CAROLINA STATE PORTS AUTHORITY AND THE S.S. UNKNOWN, an unknown ocean going ship,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Is the opinion and decision in this case rendered by the Fourth Circuit Court of Appeals in conformity with the applicable principles in the opinion and decision of this Court in Hess v. Port Authority Trans-Hudson Corporation?

B. Is the "Solvency" factor whether the State's purse is vulnerable or is it whether the judgment would be paid from the account denominated "State Treasury?"

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NO. 95-456

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

FRED W. RISTOW and SUSAN M. RISTOW,
Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN,
an unknown ocean going ship,
Respondents.

On Petition For A Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
For The Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the

Eleventh Amendment of the United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The statutes involved are quite lengthy, and their texts are located in the two Appendices. S.C. Code Ann. § 54-3-10 et seq. (1976 and Supp. 1992) is found on page E2 of Petitioners' Appendix. In Respondent's Appendix, the following statutory provisions are found: S.C. Code Ann. §§ 1-3-240; 2-17-130; 8-13-100; 9-1-10; 9-1-20; 15-78-10; 15-78-20; 15-78-30; 15-78-40; 15-78-100; 15-78-110; 15-78-120; 30-4-15; 30-4-20; 30-4-30; 42-7-60; 48-39-150; 54-3-10; 54-3-20; 54-3-130; 54-3-140; 54-3-150; 54-3-170; 54-3-610; 54-3-860; 54-3-1010; 54-3-1020; 54-3-1040; and 54-3-1050.

STATEMENT OF THE CASE

Error and Omissions in Petitioner's Statement of Case

I. The Parties

We dispute Plaintiffs' claim that Ristow is a stevedore.

The nature and status of the Defendant South Carolina State Ports Authority ("S.C. Ports Authority") is the principal issue. The scanty and argumentative description of the S.C. Ports Authority by the Petitioner is inadequate.

The S.C. Ports Authority is purely the State of South Carolina: it has no local interest or control; it has no private interest, investment, or control; and it involves no interest of another state or of the federal government.

The Petition erroneously describes the powers of the S.C. Ports Authority as "highly autonomous." (Petition P. 51) While its powers are special because of the S.C. Ports Authority's special mission, it has no autonomy as defined in Black's Law Dictionary 122 (5th ed. 1979). It is not independent of the State or self-governing.

The following facts were presented to the Court of Appeals: The S.C. Ports Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in S.C. Code Ann. §§ 54-3-10 to 54-3-1050 (1976 & Supp. 1992). (Relevant portions of which are reprinted in Respondent's Appendix.)

The S.C. Ports Authority is governed by a Board, all the members of which are appointed by the Governor of the State of South Carolina, with the advice and consent of the South Carolina Senate. S.C. Code Ann. § 54-3-20 (1976). (App. p. A13) These members can be removed at any time at the discretion of the governor. S.C. Code § 1-3-240 (App. p. A1, A27)

The property of the S.C. Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State. S.C. Code Ann. § 54-3-1050 (1976). (App. p. A22, A27)

All net earnings of the S.C. Ports Authority not necessary or desirable for the operation of its business shall be and have been held subject to further action of

the South Carolina General Assembly. S.C. Code Ann. § 54-3-1020 (1976). (App. p. A21, A25-A28)

The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand Dollars for the initial operation of capital and maintenance of the ports facilities of the S.C. Ports Authority. The General Assembly of the State of South Carolina made annual appropriations for the operation of the S.C. Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959. (App. pp. A32, A33)

Since 1959, the General Assembly of the State of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance certain capital improvements for the S.C. Ports Authority. (App. p. 33)

The State of South Carolina has issued a total in excess of One Hundred Thirty-two Million Dollars worth of these general obligations bonds. The proceeds of these bonds were deposited in the State Treasury and were distributed to the Authority on the direction of the General Assembly. (App. p. 33)

The employees of the S.C. Ports Authority are under the State Employees Workers' Compensation Plan [S.C. Code Ann. § 42-7-60 (1976, as amended)], and the South Carolina Retirement System (for State employees). S.C. Code Ann. §§ 9-1-10, 9-1-20 (1976, as amended). (App. pp. A2, A3, A11, A28)

The S.C. Ports Authority is, and has been, engaged in promoting, developing, constructing, equipping,

maintaining and operating the harbors and seaports within the State, (namely Port Royal, Charleston and Georgetown) for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the State. S.C. Code Ann. § 54-3-130 (1976, as amended). (App. pp. A13, A29)

The S.C. Ports Authority has a broad power of eminent domain and has exercised this power. S.C. Code Ann. 54-3-150 (1976, as amended). (App. pp. A18, A29)

The S.C. Ports Authority has the power to take exclusively, occupy, and use and possess (insofar as may be necessary to carry out its functions) any area of land owned by the State of South Carolina, the counties of Beaufort, Georgetown and Charleston, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining. The S.C. Ports Authority has exercised this power. S.C. Code Ann. § 54-3-170 (1976, as Amended). (App. pp. A19, A29-A30)

The general obligation bonds issued by the State of South Carolina to fund some of the projects of the S.C. Ports Authority are paid (both interest and principal) from the general state funds appropriated by the General Assembly. (App. p. A33)

In addition, revenue bonds have been issued by the S.C. Ports Authority to fund some of the projects of the S.C. Ports Authority and are authorized by State law. S. C. Code Ann. § 54-3-1010 (1976, as Amended). Other

agencies of the State issue revenue bonds in the same manner as does the S.C. Ports Authority. The S.C. Ports Authority revenue bonds are tax exempt. (App. pp. A34-A35)

In 1992, the State of South Carolina designated the S.C. Ports Authority as the agency to acquire the site for the new BMW plant in Spartanburg County, and to perform other obligations of the State to BMW. Thirty-two Million Dollars were transferred from the State Treasury to the account of the S.C. Ports Authority to pay the purchase price of the land. An additional Eight Million Dollars was transferred to prepare the site for BMW's use. The S.C. Ports Authority also used Five Million Dollars of funds already in its account to provide additional funds to acquire the property for this plant site. (App. p. A35)

The S.C. Ports Authority is listed as an agency for the State in each annual Legislative Manual, and its operations are included in each annual Comprehensive Financial Statement of the State of South Carolina. (App. p. A35)

The S.C. Ports Authority has no stock, no stockholders, and no private interests in its operations. (App. p. A35)

The S.C. Ports Authority and its officials and employees are subject to the State Ethics Act. S.C. Code Ann. § 2-17-130 and § 8-13-100 (1976, as Amended). (App. pp. A1, A35)

The S.C. Ports Authority appoints and hires the Executive Director of the S.C. Ports Authority, and he

serves at the pleasure of the board. The Board of the S.C. Ports Authority supervises the employment of all other employees of the S.C. Ports Authority. (App. p. A36)

The Staff of the S.C. Ports Authority works with the staff of the other State agencies on a daily basis. (App. p. A36)

The S.C. Ports Authority publishes its annual report in newspapers throughout the State (S.C. Code Ann. § 54-3-1040), and delivers it to the General Assembly. S.C. Code Ann. § 54-3-860 (1976, as Amended). (App. pp. A20, A22, A36)

The S.C. Ports Authority has quasi-police type controls over the Port (See title 54 of S.C. Code) and must approve [S.C. Code Ann. § 54-3-610, (1976, as Amended)] or certify all private piers in the Port of Charleston, and in other critical areas. [See §§ 48-39-150 (1976, as Amended)] (App. pp. A12, A20, A36)

Loss claims and legal tort actions against the S.C. Ports Authority are controlled by the South Carolina Tort Claims Act. See S.C. Code Ann. §§ 15-78-10, 15-78-20, 15-78-30, 15-78-40, 15-78-100, 15-78-110 (1986, as Amended). (App. pp. A3-A8) The S.C. Ports Authority is also subject to the S.C. Freedom of Information Act S.C. Code Ann. §§ 30-4-15, 30-4-20, 30-4-30 (1976, as Amended). (App. pp. A10, A11). The S.C. Ports Authority may hold property either in its name or in the name of the State. S.C. Code Ann. § 54-3-140 (1976, as Amended). (App. pp. A15, A36)

In a very real sense, the S.C. Ports Authority is an agency of the State of South Carolina. It shares in the

state's sovereignty and is completely identified with the State. Its functions are unquestionably of a governmental character. It is very much a part of the State. (App. p. A36)

II. The Incident in Question

The S. C. Ports Authority disputes the facts of the incident involved as set forth in the Petition on pages 5 through 8. We acknowledge that Petitioner had an accident on that day and in the general location, and that he may have been injured.

The insurer is inaccurately identified as "Lloyds of London" (Petition p. 7), when the insurer is actually a group of corporate insurers belonging to the London Institute of Underwriters. We have no direct information as to the matters described on page 7 of the Petition. We are informed and believe that the Adjuster ordered the proposed settlement check of $75,000.00. When the check arrived he tendered the check to Petitioners, but Petitioners refused to accept the check or sign settlement papers. The Adjusters then advised Petitioners that the statute of limitations would run in a few days, and that they should act promptly. Petitioners' statement acknowledges that they checked on the statute before it ran, but received false information from a party unrelated to this action. (Pet. App. p. H 3&4.)

The first and second claims alleged in Petitioners' Complaint are covered by the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-110 (1986, as Amended) provides that any action covered by that Act is barred unless commenced or a verified claim filed within two years after the occurrence. S.C. Code Ann. § 15-78-100

requires that the action be brought in the State Circuit Court in the County where the act or omission occurred. S.C. Code Ann. § 15-78-20(e) specifically states:

> (e) Nothing in this chapter is construed as a waiver of the State's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

Petitioners commenced this action in the United States District Court for the District of South Carolina almost three years after the incident of December 20, 1988, and Petitioners never filed a verified claim. (Appendix of Petitioners at D15 and D16). Petitioners claimed a waiver disallowed under South Carolina Law (Appendix of Petitioners at D15 and D16, and Rink v. Richland Memorial Hospital, __ S.C. __, 422 S.E.2d 747 (1992) and Searcy v. Dept. of Education, 303 S.C. 544, 402 S.E.2d 486 (Ct. App. 1991).

SUMMARY OF THE ARGUMENT

The South Carolina State Ports Authority meets the standards for Eleventh Amendment protection because it was created by the state and it is operated and controlled by a state appointed board. There is no private, local, or other-state interest or control in or over this Authority.

This Authority meets the tests set forth in Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. __, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994) because the

federal courts are here being used by the Ristows in an attempt to pursue a state law tort claim in violation of the South Carolina Tort Claims Act, thereby offending the dignity of the state. This Authority meets the solvency test in Hess because it has been and continues to be funded by the state, all of its funds and assets come directly or indirectly from the state, and its accounts are used as a state treasury.

South Carolina specifically denies by statute any waiver of Eleventh Amendment Immunity (S.C. Code § 15-78-20(e)), and designates that such tort actions must be brought in state court with 2 years after the act or omission occurred. S.C. Code § 15-78-100.

V. ARGUMENT

A. The S.C. Ports Authority meets the Eleventh Amendment Immunity Tests of Hess

Writing for the Hess Court, Justice Ginsburg observes that "[t]he Eleventh Amendment largely shields States from suit in federal court without their consent...." Hess, 115 S.Ct. at 400. Two purposes are served by this arrangement: the protection of the State's dignity and the protection of the State's solvency. Id., at 406. Originally, in protecting the State's solvency, the Eleventh Amendment shielded the states from having the federal courts deplete their treasuries to pay Revolutionary War debts. Id., at 400. More recently, jurisprudence has held that the purpose of this shield is "a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity", "thus accord[ing] the States the respect owed them as members

of the federation", and "emphasiz[ing] the integrity retained by each State in our federal system". Id., at 400. This Court has directed that "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide." Id., at 404.

The S.C. Ports Authority meets this Eleventh Amendment analysis on both counts. To deny the S.C. Ports Authority sovereign immunity in the federal courts would damage both the dignity of the State of South Carolina and its treasury.

1. Denial of Eleventh Amendment Immunity Would be an Affront to the Dignity of South Carolina

This action by Ristow is an apparent move to by-pass the provisions of the S.C. Tort Claims Act. S.C. Code Ann. §§ 15-78-10, et seq. Ristow seeks to avoid the forum specified and designated by that act. S.C. Code Ann. § 15-78-100(b)(1986). Petitioners' Brief, at 64. Ristow also seeks to by-pass its statute of limitations [S.C. Code Ann., §§ 15-78-100(a) and 15-78-110 (1986)], and to avoid its cap on the amount of recovery. S.C. Code Ann., § 15-78-120 (1986). Petitioners' Brief, at 56. Ristow seeks to gain these advantages over the citizens of South Carolina who are bound by the express statutory restrictions placed on the same types of claims. Thus, Ristow mounts a massive flank attack on the South Carolina Tort Claims Act using the federal courts as a vehicle. South Carolina's integrity would be compromised if such an attack were successful, because South Carolina has never consented to power sharing for its agencies as did the states of New York and New Jersey. Hess, 115 S.Ct. at 401.

The Complaint alleges a claim of negligence against the S.C. Ports Authority. Torts against the state are governed by the South Carolina Tort Claim Act. S.C. Code Ann., §§ 15-78-10, et seq. (1986, as Amended). This act expressly includes state authorities such as the S.C. Ports Authority . S.C. Code Ann., §§ 15-78-30 and 15-78-40 (1986, as Amended). Therefore, unlike many of the older federal cases where Eleventh Amendment immunity was denied, the state here has provided a forum for Ristow's Complaint.

All claims mentioned by the Complaint arose after passage of the S.C. Tort Claims Act. This Act states that the General Assembly intended to preserve immunity from liability and suit in tort except as waived in the Act. S.C. Code Ann., § 15-78-20(b). The Act further expressly states that: "[j]urisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred." S.C. Code Ann., §§ 15-78-100(b). Furthermore, § 15-78-20(e) specifically disclaims any waiver of the state's Eleventh Amendment immunity.

The designation by the state of where suit may be brought is to be given effect under the Eleventh Amendment. As stated by this Court, "[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L.Ed.2d 67 (1984) (emphasis original). It is established law that a state waiving immunity from suit in its own Courts does not constitute waiver of the Eleventh Amendment or consent to submit to jurisdiction in Federal Courts. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142, 87

L.Ed.2d 171 (1985). Therefore, since the state has provided a forum for this type of action, this suit should have been brought in state Court, and was properly dismissed from federal court.

Many factors combined in the Hess case to show that denying Eleventh Amendment immunity was not an affront to the dignity of the States of New York and New Jersey. Prominent in that case was the fact that the N.Y.-N.J. Port Authority is a bistate entity. The very structure of a bistate entity puts it in a different position from a state agency such as the S.C. Ports Authority. This Court noted that bistate entities are formed by not one, but "three discrete sovereigns: two States and the federal government." Hess, 115 S.Ct. at 400. The mission of such entities is to address interests that cross State lines, and region-wide problems. Id., at 400-401. This Court even noted that a compact with Congressional consent is a "means of safeguarding the national interest." Id., at 401.

Therefore, for an entity such as the N.Y.- N.J. Port Authority, "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court ... is ordained by one of the entity's founders." Id., at 401. "Nor is the integrity of the compacting States compromised" because under the Constitution, States agreed to such power sharing and coordination for bistate entities. Id., at 401. So important is the issue of a bistate entity, that when one exists, it raises a presumption that Eleventh Amendment immunity does not exist. Id., at 402.

Obviously, this is a major difference between the N.Y.- N.J. Port Authority and the S.C. Ports Authority. The S.C. Ports Authority was created by one state alone. Its mission is to stimulate water-borne commerce through

the harbors and seaports of South Carolina. South Carolina has neither surrendered nor shared any portion of its authority over the S.C. Ports Authority with another state or with the federal government. And Ristow's claim is primarily a State Tort action.

The fact that the N.Y.- N.J. Port Authority is a bistate entity created other problems for it as well. The Court notes that this means political accountability is diffuse, and it is without a tight tie to the people of one state. Id., at 401. The legislation creating the compact calls it a "joint or common agency", not a State agency. Id., at 403. The legislation creating the compact has the effect of insulating the two states from the debts of the N.Y.- N.J. Port Authority in a way not experienced by a State Agency. This Court noted that it was conceived as a "fiscally independent entity financed predominantly by private funds" which "generates its own revenues, and for decades has received no money from the States." Id., at 403. The States have even agreed to an annual limit of $100,000.00 each to help meet only administrative expenses, if needed, and only with the approval of each governor. Id., at 403. All of which effectively insulates the N.Y.-N.J. Port Authority from direct control by any one State so that it is "two or more steps removed from popular control." Id., at 401.

> In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system.
>
> Accordingly, there is good reason not to

> amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes.

Id., at 402.

The factors in Hess which did indicate immunity were insufficient to overcome the presumption created by its bistate status. Factors listed in favor of immunity were state appointments for commissioners, the ability of the governors to block actions of their Commissioners, and the ability of both state legislatures (acting together) to enlarge the powers of the N.Y.- N.J. Port Authority. Id., at 402-403. This Court noted that State courts had repeatedly typed the N.Y.- N.J. Port Authority as a State agency. Id., at 403. Nonetheless, due to the nature of the Bistate entity and the relationship thereby created between the federal government and the States, it was not disrespectful to the States, nor was there any "genuine threat to the dignity of New York or New Jersey in allowing Hess and Walsh to pursue FELA claims against PATH in federal court...." Id., at 404.

By contrast, the S.C. Ports Authority is a true state agency. Not only do the enabling statutes (S.C. Code Ann. §§ 54-3-10, et seq.), and the State courts [See South Carolina Farm Bureau Marketing Association v. South Carolina State Ports Authority, 278 S.C. 198, 293 S.E.2d 854 (1982), and South Carolina Tax Commission v. South Carolina State Ports Authority, (S.C. Tax Commission, Nov. 9, 1980). Respondent's App. pp. A23-A26.] refer to it as such, but the structure and operations of the agency reflect it. It was created by and is subject to the legislature of South Carolina. All of its members are appointed by the State's governor with the advice and consent of the Senate. As discussed in detail below, the

funds of the S.C. Ports Authority are part of the State's funds, and the State uses them accordingly. The State provides a large part of the S.C. Ports Authority's budget through its general obligation bonds, and has placed no annual restriction on the amount the State will pay toward its operating expenses. Unlike the Port of New York and New Jersey, the S.C. Ports Authority does not operate in a "defined geographic area." Hess, 115 S.Ct. at 398. The S.C. Ports Authority's domain is the entire state, with foreign trade zones in Greenville and Richland counties (the upper and mid sections of the State) and an inland port in Spartanburg County, not to mention the three coastal ports in Charleston, Georgetown, and Beaufort Counties. Board members are appointed from all over the state, and there is no requirement here that they live within proximity to a Port. In short, the S.C. Ports Authority was created to serve the entire State of South Carolina by acting as an engine for its industry, agriculture, and business, and it has done just that.

Furthermore, as discussed above and unlike the States of New York and New Jersey, the State of South Carolina has specifically reserved control over the S.C. Ports Authority as to legal claims by expressly reserving its Eleventh Amendment immunity. And unlike Hess where the claims arose under federal law [(FELA); Hess, 115 S.Ct., at 401], the claim of Ristow is basically a state law action, a tort claim.

Whereas the legislation creating the Port of New York and New Jersey has the effect of distancing that entity from State control, the legislation creating South Carolina's Port Authority has the opposite effect. Unlike the N.Y.- N.J. Port Authority, the S.C. Ports Authority is not "two or more steps removed from popular control."

Id., at 401. To the contrary, South Carolina has jealously guarded this agency, knowing what its mission means to the State. For all of these reasons, denial of Eleventh Amendment immunity would indeed be an affront to the dignity of the State of South Carolina.

2. South Carolina's Purse is Vulnerable

After determining there was no affront to the dignity of the States of New York and New Jersey, Articles III and IV of the Hess opinion dealt with the "vulnerability of the purse" requirement. This Court determined that the N.Y.- N.J. Port Authority operation did not make the purse of its parent states vulnerable because of its long history of paying its own way. Hess, 115 S.Ct. at 405. The opinion states that agencies that "place heavy fiscal tolls on their founding States" (Id., at 405), or a state agency that "depends for its existence on a state-provided 'financial safety net of broad dimension'", or "[w]here an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." Id., at 405.

For its first eighteen years, operating costs of the S.C. Ports Authority were paid by annual appropriation by the S.C. General Assembly. (App. p. A32) Since that time, the S.C. Ports Authority has financed much of its capital expenses by general obligation bonds which pledge the full faith and credit of the State. (App. P. A33) The principal and interest on these bonds is paid by annual appropriations of the South Carolina General Assembly. (App. p. A33) This was not the situation in the Hess case. Hess, 115 S.Ct. at 399. Furthermore there has been a

deposit of substantial general state funds in the account of the S.C. Ports Authority, thereby making the S.C. Ports Authority account a state treasury and making South Carolina's situation very different from that of the Hess case. In Hess, the N.Y.- N.J. Port Authority had received no funds from its parent states since 1934, Id., at 405, and the states' role in its financing was described as: "if the Authority is ever in need of financial support, the states will be there to provide it." Hess, 115 S.Ct. at 398.

The S.C. Ports Authority's continued financial support from the State, its ability to tap the State's Treasury, and its ability to pledge the State credit puts it into the category of State agencies held entitled to Eleventh Amendment immunity. Id., at 405.

Any judgment against the S.C. Ports Authority would be paid with state funds, or by the sale of state property, or by insurance whose premiums were paid with state funds. All funds available to the Authority come or came from the state treasury, from rental of state property, or from fees charged for services rendered by state employees.

Ironically, had Ristow commenced this action in the prescribed court and within the prescribed time, any judgment would have been against the S. C. Ports Authority account at a time when it contained $40 Million of general state funds for the BMW project. (App. p. A35) None of the cases cited by Ristow contain the commingling of state funds which are present in this case. While the account labeled "State Treasury" was protected, state funds and state property were not.

If the General Assembly decided to abolish the S.C.

Ports Authority, no person or body could claim the property or the funds then in the name of the S.C. Ports Authority against the state. Applying an "actual financial analysis", everything in the S.C. Ports Authority's name belongs to the state, and Ristow's action is one for recovery of money from the state. "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit...." Ford Motor Co., v. Department of Treasury of State of Indiana, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). Ristow's suggested interpretation of the Eleventh Amendment is unrealistically narrow and technical.

3. The Fourth Circuit Decision in this case is Harmonious with that of the Hess Case.

In the first ruling on this case [Ristow v. South Carolina Ports Authority 27 F.3d 84 (4th Cir. 1994), hereinafter "Ristow I"], the Fourth Circuit held: "[i]t is clear that the Ports Authority owes its very existence and current financial position to the state's coffers." Ristow I, 27 F.3d at 86; and "[t]he state's withdrawal of excess Ports Authority funds and its commingling of state funds with those of the Ports Authority in transactions like the BMW transaction are a strong indication that the funds of the Ports Authority belong to the state and that a tort recovery out of those funds would constitute one from the state treasury." Id., at 86.

The first and second decisions of this case by the Fourth Circuit treat the responsibility of the State treasury as the most important factor. Ristow I, at 868, and Ristow v. S. C. State Ports Authority, ___ F.3d ___ (4th Cir. 1995) (Hereinafter "Ristow II," and reprinted in Petitioners'

Appendix at A1.)

In Ristow II, the Circuit Court concluded:

> All of this convinces us that, unlike Port Authority Trans-Hudson, the entity considered in Hess, the Ports Authority is not self-sufficient. It is true that a judgment against the Ports Authority cannot be legally enforced against the state. The practical effect of South Carolina's treatment of the fiscal affairs of the Ports Authority, however, definitively implicates the state treasury. Obviously, the legislature will not be able to withdraw net revenues "not necessary or desirable for operation" if the Ports Authority's operational funds have been depleted by judgments against it. Likewise, to the extent that a judgment would deplete its resources, the Ports Authority would be unable to utilize earnings for necessary capital improvements, and so would continue to depend on the state treasury for these required expenditures. To deny Eleventh Amendment immunity in these circumstances would ignore economic reality.

Ristow II, ___ F.3d ____ (4th Cir. 1995), Pet. App. at A15-18.

4. Some Significant Differences between the New York-New Jersey Port Authority and the South Carolina State Ports Authority.

There are important differences between the facts and the applicable law in the Hess case and the facts and applicable law in the case at hand.

a. The defendant in Hess was a separate railway corporation established by the Bistate Port Authority of New York and New Jersey (hereinafter "N.Y.-N.J. Port Authority"). Hess, 115 S.Ct. at 397 and 399. The N.Y.-N.J. Port Authority was created by a compact between the parent states and signed by the United States. Id., at 398 and 401. It was formed as a device for dealing with regional interests and as a means of safeguarding national interests. Id., at 401. As a signer of the charter, the United States was also a founder of the N.Y.-N.J. Port Authority. Id., at 401 and 404. It is noted in Section II of the Hess opinion that such bistate bodies occupy a significantly different position under the federal system than do the states themselves. Id., at 400.

The S.C. Ports Authority is not a bistate Authority operating under such a charter. The United States did not sign its charter and was not one of its founders. Both the operating and the capital costs of the S.C. Ports Authority were paid by the S.C. General Assembly for its first 18 years of operation. (App. p. A32) Since that time, the General Assembly directed the issuance of $132 million of general obligation bonds to pay for S.C. Ports Authority's capital improvements, and it continues to pay principal and interest on these bonds. (App. p. A33) The S.C. Statutes make no provision for private investment in the S.C. Ports Authority. S.C. Code Ann., §§ 54-3-10 et seq.

b. In Hess, the claim was a federal FELA claim

rather than a State law claim. Id., at 401. This, plus the bistate status of the N.Y.-N.J. Port Authority, removed the affront to the dignity of the States. Id., at 401.

In the case at hand, the basic claim is in "negligence", which under South Carolina law is permissible against the S.C. Ports Authority only under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 et seq. (1986). In Hess, the plaintiff could have brought the actions in State court, but in the case at hand the claim of the appellants (hereinafter "Ristow") is barred by the applicable South Carolina statute of limitations. S.C. Code Ann. § 15-78-100 (1986). The Tort Claims Act is the exclusive remedy, and the Eleventh Amendment is not waived. S.C. Code Ann. 15-78-20(e)(1986).(App.pp.A3-A5)

c. Hess creates a legal test for bistate entities, such as the N.Y.- N.J. Port Authority, which would not apply to State agencies like the S.C. Ports Authority. The existence of a bistate entity creates a presumption that the entity does not qualify for Eleventh Amendment immunity. Hess, 115 S.Ct. at 402. To overcome that presumption, the entity must show that "there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose." Id., at 402 and 404. This is a heavy burden to overcome, and one which the N.Y.- N.J. Port Authority was not able to meet. Nonetheless, South Carolina statutes and the practices of the State of South Carolina demonstrate that even these more stringent requirements accurately describe the situation of the S. C. Ports Authority.

d. The N.Y.- N.J. Port Authority did not rely

on its parent states for financial support. It was conceived as a financially independent entity, Hess 115 S. Ct. 398., The N.Y.- N.J. Port Authority sent its profits to the states to finance projects which the states would otherwise finance themselves. Hess, 115 S.Ct. at 405. The N.Y.-N.J. Port Authority last received funds from its states in 1934. Id., at 405. The N. Y.- N. J. Port Authority was to be funded primarily by private investment. Id., at 403. The States agreed to pay only $100,000 per year per state to finance operations "until the revenues from operations ... are adequate to meet all expenditures." Id., at 399.

South Carolina statutes nowhere state or suggest that the S.C. Ports Authority is to be independent. The State has issued One hundred, thirty two million ($132,000,000.00) dollars worth of general obligation bonds to pay for the capital improvements for the S.C. Ports Authority and continues to pay principal and interest on such bonds. (App. p. A33) The operating costs for the first eighteen years of operations of the S.C. Ports Authority were paid by appropriations from the South Carolina General Assembly. (App. p. A32) In 1992, $40 million dollars of State General Funds were deposited in the account of the S.C. Ports Authority, and were distributed by the S.C. Ports Authority for a state project. Pet. App., at A15, n. 7. (App. p. A35) The State of South Carolina continues to supply funds and capital to the S.C. Ports Authority. The amount of General Obligation bonds issued to fund the S.C. Ports Authority increased substantially while this action was in process. Pet. App. at A14.

e. The N.Y.- N.J. Port Authority is controlled by a board of commissioners, half of whom are selected by each state. Hess, 115 S.Ct. at 399. The governor of each

state may veto the actions of Commission members appointed by that state. Id., at 399.

All of the members of the governing board of the S.C. Ports Authority are appointed by the governor of South Carolina with the approval of the South Carolina Senate. S.C. Code Ann., § 54-3-20 (1976, as Amended). These members are removable, at his discretion, by the governor of the State. S.C. Code Ann. § 1-3-240 (1993, as Amended). While it is true that the governor of South Carolina does not have veto power over the actions of the Board, this is the only significant difference between the Hess and the Ristow situation in which the case for Eleventh Amendment immunity is less favorable for South Carolina.

f. The statutes of New York and New Jersey have been determined to consent to litigation in the federal courts of cases against the N.Y.- N.J. Port Authority. Hess, 115 S.Ct. at 400, and Feeney v. Port Authority Trans-Hudson Corporation, 873 F.2d 628 (2d Cir. 1989), aff'd on other grds, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990). By comparison, S.C. Code Ann. § 15-78-20(e) expressly disclaims any waiver of the Eleventh Amendment. S.C. Code Ann. § 15-78-20(e) (a portion of the S.C. Tort Claims Act) sets the Tort Claims Act and the South Carolina courts as the sole remedy.

B. Is the "Solvency" factor issue whether the "State Purse" is involved, or is it whether the Account denominated "State Treasury" is involved?

The S. C. Ports Authority has shown that its funds are all state funds and that any judgment achieved in cases like this would be paid with state funds mixed with funds

from insurance procured with state funds. Petitioners appear to contend that unless the payment must come from the account labeled "State Treasury," Eleventh Amendment protection is denied. Surely constitutional provisions should not be so narrowly construed.

The statutes creating the Authority gave it the right to have accounts in its own name and to deposit state funds therein. Section 54-3-1020 (App. p. 21). Indeed, State funds are occasionally deposited in the Authority's account in addition to those necessary for its operating or capital expenses (App. p. A35)

We note an important technical error on page 28 of Petitioners' Brief on the "treasury" issue. Petitioner erroneously cites Jacintoport Corp. v. Greater Baton Rouge Port Commission, 762 F. 2d. 435 (5th Cir. 1985) as a "single state [entity]." Louisiana does not have a "State Ports Authority." the Fifth Circuit held properly that the Greater Baton Rouge Port Commission was a local subdivision, even though it had a slice of state power Id p. 437 and 438, and concluded "[T]he object of the Authority's concern is local under the standards set forth by McQuillan, and because it acts for the special advantage of the Baton Rouge Port, it follows that the Commission is performing a proprietary, or local, rather than governmental or statewide, function." Id p. 443. The S. C. State Ports Authority is the authority for all of South Carolina's ports and its function is statewide.

The source of all the South Carolina State Ports Authority funds and property is the State, and funds earned utilizing state employees and state property. Its account is a "state treasury."

In modern state governments, state funds are held in many accounts. To ignore this situation is, as said in Ristow II, to "ignore economic reality." Ristow II, Pet. App. at A18.

VI. CONCLUSION

The South Carolina State Ports Authority is not a marginal case but an agency of the State. It involves no special questions as to local or private interest. The Fourth Circuit reconsidered its earlier opinion in the light of Hess and affirmed it. This court should deny the Petition for Certiorari and affirm the Respondent's Eleventh Amendment immunity from suits in federal Court.

Respectfully Submitted,

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NO. 95-456

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

FRED W. RISTOW and SUSAN M. RISTOW,
Petitioners,

VS.

THE SOUTH CAROLINA STATE PORTS AUTHORITY AND THE S.S. UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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South Carolina - Administration of the Government

§ 1-3-240. Removal of officers by Governor.

(B) Any person appointed to a state office by a Governor, either with or without the advice and consent of the Senate, other than those officers enumerated in subsection (C), may be removed from office by the Governor at his discretion by an Executive Order removing the officer.

South Carolina - General Assembly (Lobbyists and Lobbying)

§ 2-17-130. Penalties For violations of provisions of this chapter.

(B) A member of the General Assembly, the Governor, the Lieutenant Governor, any other statewide constitutional officer, any public official of any state agency who engaged in covered agency actions, or any of their employees who wilfully violate the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than one year, or both.

South Carolina - Public Officers and Employees (Ethics Act)

§ 8-13-100. Definitions.

As used in Articles 1 through 11:

(25) "Public employee" means a person employed by the State, a county, a municipality, or a political

subdivision thereof.

(27) "Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. "Public official" does not mean a member of the judiciary except that for the purposes of campaign practices, campaign disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

South Carolina - Retirement Systems

§ 9-1-10. Definitions.

The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) "*Retirement System*" or "*System*" shall mean the South Carolina Retirement System established under § 9-1-20;

(5) "Employer" shall mean the State, a county board of education, a district board of trustees, a city board of education, the board of trustees or other managing board of any State-supported college or educational institution, or any other agency of the State by which a teacher or employee is paid; the term "employer" also includes a county, municipality, or other political: subdivision of the State, or any agency or department thereof, which has been admitted to the System under the provisions of § 9-1-470....

§ 9-1-20. South Carolina Retirement System created; System shall have powers and privileges of corporation; purposes of System.

A retirement system is hereby established and placed under the management of the State Budget and Control Board for the purpose of providing retirement allowances and other benefits for teachers and employees of the State and political subdivisions or agencies or departments thereof. The System so created shall have the power and privileges of a corporation and shall be known as the South Carolina Retirement System, and by such name all of its business shall be transacted, all of its funds invested and all of its cash, securities and other property held.

South Carolina Tort Claims Act

§ 15-78-10. Short title.

This chapter may be cited as the "South Carolina Tort Claims Act".

§ 15-78-20. Legislative findings; declaration of public policy; extent of, and construction of,waiver of immunity.

(a) The General Assembly finds that while a private entrepreneur may be readily held liable for negligence of his employees within the chosen ambit of his activity, the area within which government has the power to act for the public good has been without limit and, therefore, government did not have the duty to do everything which might have been done. The General Assembly further finds that each governmental entity has financial limitations within which it must exercise

authorized power and discretion in determining the extent and nature of its activities. Thus, while total immunity from liability on the part of the government is not desirable, see McCall v. Batson, neither should the government be subject to unlimited nor unqualified liability for its actions. The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions. Additionally, the General Assembly recognizes the impossibility of insuring for acts retrospectively. The General Assembly seeks an orderly transition to the recognition of individuals' rights against the tortious sovereign as defined herein. Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein. It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion. No governmental entity which was not insured at the time of the injury for which compensation is sought is liable under this chapter and those which were insured are liable only to the extent provided herein. Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.

(b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to

provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in §15-78-70(b).

(c)(i) As to those causes of action that arise or accrue prior to the effective date of this act, the General Assembly reinstates sovereign immunity on the part of the State, its political subdivisions and employees, while acting within the scope of official duty provided that sovereign immunity' will not bar recovery in any case of action arising or accruing on or before the effective date of this act if the defendant maintained liability insurance coverage.

(ii) In such cases involving governmental health care facilities, as defined in § 15-78-30(j), recovery shall not exceed the limits of the liability insurance coverage up to a maximum recovery of five hundred thousand dollars.

(iii) In all other such cases recovery shall not exceed the limits of the liability insurance coverage.

(d) Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract.

(e) Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be

sued in any state court beyond the boundaries of the State of South Carolina.

(f) The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State.

§ 15-78-30. Definitions.

(a) "Agency" means the individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college, which employs the employee whose act or omission gives rise to a claim under this chapter.

(b) "Claim" means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty.

(c) Prior to January 1, 1989, "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation....

(d) "Governmental entity" means the State and its political subdivisions.

(e) "State" means the State of South Carolina and

any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state supported governmental health care facilities, schools, colleges, universities, and technical colleges.

(f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but does not include the intentional infliction of emotional harm.

(g) "Occurrence" means an unfolding sequence of events which proximately flow from a single act of negligence.

(h) "Political subdivision" means the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof.

(i) "Scope of official duty" or "scope of state employment" means (1) acting in and about the official business of a governmental entity and (2) performing official duties.

§ 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

§ 15-78-100. When and where to institute action; requirement of special verdict specifying proportionate liability of multiple defendants.

(a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

(b) Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred.

(c) In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

§ 15-78-110. Statute of limitations.

Except as provided for in Section 15-3-40, any action

brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

§ 15-78-120. Limitation on Liability; prohibition against recovery of punitive or exemplary damages or prejudgment interest; signature of attorney on pleadings, motions, or other papers.

(a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:

(1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding two hundred fifty thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

(2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed five hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

(b) No award for damages: under this chapter shall include punitive or exemplary damages or interest prior to judgment.

South Carolina - Freedom of Information Act

§ 30-4-15. Findings and purpose.

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

§ 30-4-20. Definitions.

(a) "Public body" means any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority....

(b) "Person" includes any individual, corporation, partnership, firm, organization or association.

(c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body....

(d) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

§ 30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice.

(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

South Carolina - Workers' Compensation Fund

§ 42-7-60. Officers and employees covered by article.

Notwithstanding anything to the contrary contained in § 42-1-130, the provisions of this article apply to all officers and employees of the State and of any county, municipality, or other political subdivision thereof or any agency or institution of the State which has elected to participate under this article under the provisions. of § 42-7-50....

South Carolina - Environmental Protection and Conservation Act

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Department shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Department prior to issuing a permit.

South Carolina State Ports Authority

§ 54-3-10. Creation and membership of State Ports Authority.

The South Carolina State Ports Authority is hereby created consisting of a governing body of nine members, hereafter referred to as the Authority.

§ 54-3-20. Appointment and terms of members; vacancies.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been appointed and have qualified. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

§ 54-3-130. Purposes of Authority.

The Authority is created as an instrumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of Charleston, Georgetown and Port Royal for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the' shipment of freight and commerce through such ports, whether originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of Beaufort,Charleston or Georgetown, and to use them in such manner, within the purposes of the Authority, as shall be stipulated by the county and to act as agent or instrumentality for any of such counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(7) To cooperate and act as co-assurer with the city of Augusta, Georgia, and the Georgia State Ports Authority in furtherance of the river development project known as the Savannah River Project Below Augusta;

(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the Authority in reference to the harbors and seaports of Charleston, Georgetown and

Port Royal; and

(9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

§ 54-3-140. Powers of Authority.

In order to enable it to carry out the purposes of this chapter, the Authority:

(1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;

(2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry, out the purposes and provisions of this chapter, all or any of them;

(3) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto and the construction of belt line roads and highways and bridges

and causeways thereon and other bridges and causeways necessary or useful in connection therewith and shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads;

(4) May acquire, construct, maintain, operate and contract to operate in any of said counties airports, seaplane bases, naval bases and any other facilities necessary or useful in carrying out the purposes of this chapter and of the Authority;

(5) Shall appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof;

(6) Shall establish an office for the transaction of its business in the City of Charleston and such other offices within and without the State as may be deemed by the board to be necessary or useful in carrying out the purposes of this chapter;

(7) May create and operate such agencies and departments as the board may deem necessary or useful for the furtherance of any of the purposes of this chapter;

(8) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in

carrying out and accomplishing the purposes of this chapter;

(9) May apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(10) May act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(11) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the powers granted to it may be enjoyed and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) May do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers in this section mentioned;

(13) May do any and all things necessary to accomplish the purposes of this chapter; and

(14) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of persons, firms or corporations using or doing business on such property or facilities, and for license fees to cover the expense thereof. Licenses may be revoked after notice and hearing by the Authority for wilful breach of or failure to comply with such rules and regulations.

But the Authority shall not engage in shipbuilding except upon the unanimous vote of its members.

§ 54-3-150. Acquisition of property.

For the acquiring of rights-of-way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses, and other riparian and littoral terminals and structures and approaches to them and transportation facilities needful for their convenient use and belt line roads and highways, causeways, and bridges and other

bridges and causeways, and for the acquiring of property necessary for the river development project known as the Savannah River Project Below Augusta, and for the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, the Authority may purchase them by negotiation or may condemn them. The power of eminent domain shall apply not only to all property of private persons or corporations but also as to property already devoted to public use.

§ 54-3-170. Use of certain State property.

The Authority may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the riparian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

§ 54-3-610. Powers of Authority as to erection or removal of wharves, docks and other structures.

The Authority may fix the lines along the bay and harbor of Charleston and the rivers and creeks flowing therein within which riparian owners may erect wharves, docks and other proper erections and fixtures for commercial, manufacturing or any other purposes. The Authority may cause the removal of any wharf, dock, wreck or other structure that may obstruct navigation or that may, in its opinion, be injurious to said bay, harbor, rivers or creeks, at the expense of the owner or the person causing the obstructions. But the rights of any owner of a wharf whose lines have heretofore been fixed by grant or by authority of State legislation are in no wise to be disturbed.

§ 54-3-860. Authority shall report annually to General Assembly.

The Authority shall annually report to the General Assembly the amounts received for fees, harbor or port charges, fines and penalties and the disbursement thereof and also generally its acts and doings under this article.

§ 54-3-1010. Issuance of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building structure, terminal railroad or any other matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain or operate, all or any of them, the Authority may issue bonds, payable both as to

principal and interest from the revenues to be derived from the operation of all or any part of its properties and facilities, and the powers and authority granted to counties, cities, school districts and other political subdivisions of the State are hereby extended to and made available to the Authority. All revenue bonds issued by the Authority to obtain funds for the acquisition, construction, equipment, maintenance and operation of its properties and facilities shall be issued in accordance with the provisions of §§ 6-21-10 to 6-21-570 and all conditions, restrictions and limitations imposed by said §§ 6--21-10 to 6-21-570 as amended, shall be observed by the Authority in the issuance of such bonds, except as follows:

(1) A pledge of the net revenues derived from the operation of its properties and facilities, all or any of them, rather than its gross revenues, may be made; and

(2) Free service may, in the discretion of the Authority, be afforded to the United States of America, or any agency, department, corporation or instrumentality thereof by any property or facility of the Authority to acquire, construct, equip, maintain and operate which funds were obtained from the revenue bonds purchased and held by a Federal agency, provided such free service is with the consent and at the request of the Federal agency then holding the whole of such revenue bonds.

§ 54-3-1020. Disbursement of funds; surplus.

All funds of the Authority shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer of the Authority and countersigned by the

chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this chapter and only when the account or expenditure for which they are to be given in payment has been audited and approved by the Authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly.

§ 54-3-1040. Annual financial statement.

At least once in each year the Authority shall publish once in some newspaper published in Charleston County a complete detailed statement of all moneys received and disbursed by the Authority during the preceding year. Such statement shall also show the several sources from which such funds were received and the balance on hand at the time of publishing the statement and shall show the complete financial condition of the Authority.

§ 54-3-1050. Property of Authority exempt from taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon.

STATE OF SOUTH CAROLINA BEFORE THE SOUTH CAROLINA TAX COMMISSION

IN RE:

A Finding of the Tax Status of Certain Property of the South Carolina State Ports Authority.

FINDINGS OF FACT

The Authority was created by the General Assembly as an instrumentality of the State to develop its harbors and seaports for use in commerce. Section 54-3-10, et seq.

The Authority holds title to certain land situate in Charleston County that is leased or its use licensed to others. The Assessor of Charleston County, acting under the authority os Section 12-37-220A(1), has concluded that certain parcels or tracts of land are taxable. The South Carolina Constitution provides an exemption for property owned by the State when used exclusively for public purposes. Section 12-37-220A(1) provides that the county tax assessor and the Tax Commission shall declare such nonexclusive use and we thus consider the question in that light.

Basically, the use of the various parcels or tracts can be consolidated into two groups. One would be the property of the Authority that is leased or licensed for use in commerce originating, ending or passing through the Authority's port or harbor terminal by private business. This would include the Authority's property on which the goods in commerce may be temporarily stored, collected or assembled. The other group would consist of property,

the use of which is not related to the Authority's duty or purpose; in example, property that is leased to others and used for private vehicle parking spaces.

The State is not in the business of transporting the goods in commerce. It only furnishes the facilities through which commerce is conducted by private business. The dock and terminal correctly were not considered taxable, notwithstanding use of the same by private business. One would not argue that a public highway is taxable because private utilities use a part of the same. the evidence before us establishes that the property that is leased or licensed for commerce purposes results in a decided benefit for the State. The Authority by providing the property is assured of greater cargo tonnage, of shorter dock time for the ocean-going vessels and of the responsibility of loss or theft of the goods. It thus appears to our satisfaction that this constitutes a public purpose and within the duties and powers considered by the General Assembly when the Authority was created.

> "The courts have, as a rule, been reluctant to attempt to define public purpose as contrasted with a private purpose, but have generally left each case to be determined on its own peculiar circumstances. As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private

> purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment." Anderson v. Baehr, 265 S.C. 153, 217 S.E. 2d 43.

We thus find that the property of the Authority is exempt from taxation when leased or licensed to others for actual use in commerce.

The other property of the Authority is not used in connection with its purpose. It is property not presently needed by the Authority and is held for future use. Generally, and as a convenience, it is leased to others for a private use and for purposes not connected with commerce; in example, as parking space for vehicles. We find that this property is subject to taxation in that such use is not for an exclusively public purpose.

CONCLUSION

We conclude that the property of the south Carolina State Ports Authority that is leased or its use licensed to others for use in the business of actually moving or storing goods for transportation in commerce is used exclusively for a public purpose. Any private benefit would be incidental.

We further conclude that property that is owned by the Authority and leased to others and not actually used in moving or storing goods for transportation in commerce is taxable.

The Assessor of Charleston County should identify such property and enter the same upon the records of Charleston County for tax purposes.

AND IT IS SO FOUND AND ORDERED.
SOUTH CAROLINA TAX COMMISSION

s _____
Robert C. Wasson, Chairman

s _____
John H. LaFitte, Jr., Commissioner

s _____
Charles N. Plowden, Commissioner

Columbia, South Carolina

November 18, 1980

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF CHARLESTON)

PERSONALLY APPEARED before me, WILLIAM M. LAWRENCE, who, upon oath duly sworn, states and affirms as follows:

1. My name is William M. Lawrence, and I am the chief financial officer of the South Carolina State Ports Authority and have custody and control of the records of the South Carolina State Ports Authority. I have been employed by the South Carolina State Ports Authority in executive and administrative positions since 1974. Based on the records of the South Carolina State Ports Authority and my own experience, I certify as follows:

a. That the South Carolina State Ports Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in S. C. Code Ann. § 3-10 to -1050 (1976 & Supp. 1988).

b. That the South Carolina State Ports Authority is governed by a Board, the members of which are appointed by the Governor of the State of South Carolina, with the advice and consent of the South Carolina Senate.

c. That the property of the South Carolina State Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State.

d. All net earnings of the South Carolina

State Ports Authority not necessary or desirable for the operation of its shall be and have been held subject to further action of the South Carolina General Assembly, and the South Carolina State Ports Authority has paid into the State Treasury a total in excess on One and One-half Million Dollars ($1,500,000.00) of such net earnings since its creation.

e. The General Assembly of the State of South Carolina made annual appropriations of the operation of the South Carolina State Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959.

f. Since 1959, the General Assembly of the state of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance capital improvements for the South Carolina State Ports Authority.

g. The State of South Carolina has issued a total in excess of One Hundred Million Dollars ($100,000,000.00) worth of General Obligation Bonds to finance capital improvements for the South Carolina State Ports Authority. The proceeds of these bonds were deposited in the State Treasury and were distributed to the South Carolina State Ports Authority on the direction of the General Assembly.

h. The employees of the South Carolina State Ports Authority are under the South Carolina State Employees Workers' Compensation Act and the State Employees Retirement Plan.

i. The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand Dollars ($750,000.00) for the initial operation of capital and maintenance of the port facilities of the South Carolina State Ports Authority.

j. The State of South Carolina, through the South Carolina State Ports Authority, is, and has engaged in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, namely Port Royal, Charleston, and Georgetown, and works of internal improvements incident thereto, including the acquisition and construction, maintenance and operation of terminal facilities.

k. The South Carolina State Ports Authority was created and is and has been acting as an instrumentality of the State for the accomplishment of general purposes which include development and improvements of the harbors or seaports of Port Royal, Charleston, and Georgetown for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the state.

l. The South Carolina State Ports Authority has a broad power of eminent domain and has exercised this power.

m. The South Carolina State Ports Authority has the power to take exclusively, occupy, use, and possess insofar as may be necessary to carry out its functions, any area of land owned by the State of South

Carolina, the counties of Beaufort, Georgetown, and Charleston, not in use for State purposes, including swamps and overflow of lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining and the said South Carolina State Ports Authority has exercised this power.

n. The South Carolina State Ports Authority is an agency of the State of South Carolina, is in a real sense a part of the State and shares in its sovereignty, and is completely identified with the State and the performance of its functions which are unquestionably of a governmental character.

2. I have given this statement freely and voluntarily, and it is true and correct to the best of my knowledge and belief.

Dated this the 24th day of April, 1992.

/s/ William M. Lawrence
William M. Lawrence
Chief Financial Officer
South Carolina State
Ports Authority

SWORN AND SUBSCRIBED
before me this the 24th
day of April, 1992.

/s/ Janice E. Lockridge
Notary Public South Carolina
My Commission Expires: Sept. 24, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,	)	Civil Action No. 2:91-3677-2J
Plaintiffs,	)	**SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS**
v.	)	
SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,	)	
Defendants.	)	

PERSONALLY APPEARED before me, WILLIAM M. LAWRENCE, who, upon oath duly sworn, states and affirms as follows:

1. My name is William M. Lawrence, and I am the chief financial officer of the South Carolina State Ports Authority and have custody and control of the records of the South Carolina State Ports Authority. I have been employed by the South Carolina State Ports Authority in executive and administrative positions since 1974. Based on the records of the South Carolina State Ports Authority and my own experience, I certify as follows:

a. That the South Carolina State Ports Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in S. C. Code Ann. §§ 54-3-10 to 54-3-1050 (1976 & Supp. 1992).

b. That the South Carolina State Ports Authority is governed by a Board, all of the members of which are appointed by the Governor of the State of South Carolina, with the advice and consent of the South Carolina Senate.

c. That the property of the South Carolina State Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State.

d. All net earnings of the South Carolina State Ports Authority not necessary or desirable for the operation of its business shall be and have been held subject to further action of the South Carolina General Assembly, and the South Carolina State Ports Authority has paid into the State Treasury a total in excess of One Million Five Hundred Thousand Dollars of such net earnings since its creation.

e. The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand and no/100 ($750,000.00) Dollars for the initial operation of capital and maintenance of the port's facilities of the South Carolina State Ports Authority. The General Assembly of the State of South Carolina made annual appropriations for the operation of the South Carolina State Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957,

1958, and 1959.

f. Since 1959, the General Assembly of the state of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance certain capital improvements for the South Carolina State Ports Authority.

g. The State of South Carolina has issued a total in excess of One Hundred Thirty-two Million and no/100 ($132,000,000.00) Dollars worth of general obligation bonds to finance certain capital improvements for the South Carolina State Ports Authority. The proceeds of these bonds were deposited in the State Treasury and were distributed to the South Carolina State Ports Authority on the direction of the General Assembly.

h. The employees of the South Carolina State Ports Authority are under the State Employees Workers' Compensation Plan S.C. Code §§ 42-7-10 et seq. and the South Carolina Retirement System (for State employees) S.C. Code §§ 9-1-10 et seq.

i. The State of South Carolina, through the South Carolina State Ports Authority, is, and has engaged in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, namely Port Royal, Charleston, and Georgetown, and works of internal improvements incident thereto, including the acquisition and construction, maintenance and operation of terminal facilities.

j. The South Carolina State Ports Authority was created and is and has been acting as an

instrumentality of the State for the accomplishment of general purposes which include development and improvements of the harbors or seaports of Port Royal, Charleston, and Georgetown for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the State.

k. The South Carolina State Ports Authority has a broad power of eminent domain and has exercised this power. (S.C. Code § 54-3-150, 1976, as amended.)

l. The South Carolina State Ports Authority has the power to take exclusively, occupy, use, and possess insofar as may be necessary to carry out its functions, any area of land owned by the State of South Carolina, the counties of Beaufort, Georgetown and Charleston, not in use for State purposes, including swamps and overflow of lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining and the said South Carolina State Ports Authority has exercised this power. S. C. Code § 54-3-170 (1976 Supp. 1992.)

m. The general obligation bonds issued by the State of South Carolina to fund some of the projects of the South Carolina State Ports Authority are paid (both interest and principal) from the general funds appropriated by the General Assembly.

n. The revenue bonds issued by the South Carolina State Ports Authority to fund some of the projects of the South Carolina State Ports Authority are authorized by State law S.C. Code §54-3-100. Other

agencies of the State issue revenue bonds in the same manner as does the South Carolina State Ports Authority. The South Carolina State Ports Authority revenue bonds are tax exempt.

o. In 1992, the State of South Carolina designated the South Carolina State Ports Authority as the agency to acquire the site for the new BMW plant in Spartanburg County and to perform other obligations of the State to BMW. Thirty-two Million and No/100 ($32,000,000.00) Dollars were transferred from the State Treasury to the account of the South Carolina State Ports Authority to pay the purchase price of the land. An additional Eight Million and No/100 ($8,000,000.00) Dollars was transferred to prepare the site for BMW's use. The South Carolina State Ports Authority also used Five Million and No/100 ($5,000,000.00) Dollars of its funds to provide additional funds to acquire the property for this plant site.

p. The South Carolina State Ports Authority is listed as an agency of the State in each annual Legislative Manual, and its operations are included in each annual Comprehensive Financial Statement of the State of South Carolina.

q. The South Carolina State Ports Authority has no stock, no stockholders, and no private interests in its operations.

r. The South Carolina State Ports Authority and its officials and employees are subject to the State Ethnics [sic - Ethics] Act. S.C. Code §§ 2-17-5 et seq. and 8-13-100 et seq.

s. The South Carolina State Ports Authority appoints and hires the Executive Director of the Authority, and he serves at the pleasure of the Board. The Board of the authority supervises the employment of all other employees of the Authority.

t. The staff of the South Carolina State Ports Authority works with the staff of the other State agencies on a daily basis.

u. The South Carolina State Ports Authority publishes its annual report in newspapers throughout the State (S.C. Code § 54-3-1040) and delivers it to the General Assembly. (S.C. Code § 54-3-860).

v. The South Carolina State Ports Authority has quasi-police type controls over the Port (See title 54 of S.C. Code) and must approve (S.C. Code § 5-3-610 et seq.) or certify all private piers in the port of Charleston and in other critical areas. (See §§ 48-39-110 and 48-39-150.)

w. Lost [sic - Loss] claims and legal actions against the South Carolina State Ports Authority are controlled by the South Carolina Tort Claims Act. S.C. Code § 15-78-10 et seq., and the South Carolina State Ports Authority is subject to the S.C. Freedom of Information Act S.C. Code 30-4-10 et seq.

x. The South Carolina State Ports Authority is an agency of the State of South Carolina, is in a real sense a part of the State and shares in its sovereignty, and is completely identified with the State and the performance of its functions which are unquestionably of a governmental character.

2. I have given this statement freely and voluntarily, and it is true and correct to the best of my knowledge and belief.

Dated this the 27th day of May, 1993.

/s/ William M. Lawrence
William M. Lawrence
Chief Financial Officer
South Carolina State
Ports Authority

SWORN AND SUBSCRIBED
before me this the 27th
day of May, 1993.

/s/ Janice E. Lockridge
Notary Public South Carolina
My Commission Expires: Sept. 24, 2001